



The National Association of State Departments of Agriculture (NASDA)
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Stephen Haterius, Executive Director

October 15, 2010

Water Docket
U.S. Environmental Protection Agency
Mail code: 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Attention: Docket ID No. EPA-R03-OW-2010-0736

Re: EPA-R03-OW-2010-0736 – Draft Chesapeake Bay Total Maximum Daily Load

To whom it may concern:

The National Association of State Departments of Agriculture (NASDA) respectfully requests the U.S. Environmental Protection Agency (EPA) withdraw its draft Chesapeake Bay Total Maximum Daily Load (Draft TMDL) released for public comment on September 24, 2010. 75 Fed. Reg. 57776 (Sept. 22, 2010) (Docket Number EPA-R03-OW-2010-0736) (hereinafter Draft TMDL). If EPA does not withdraw the Draft TMDL, we request EPA to make the models EPA relied on to develop the TMDL available to the public and to provide the public with 120 days to review and comment on these models following their release.

NASDA represents the commissioners, secretaries, and directors of the state departments of agriculture in all fifty states and four U.S. territories. State departments of agriculture are responsible for a wide range of programs including food safety, combating the spread of disease, and fostering the economic vitality of our rural communities. Conservation and environmental protection, particularly in regards to pesticide regulation, are also among our chief responsibilities. We are basing this request, in part, on discussions with the agriculture community and are aware of a similar letter by a number of agricultural organizations.

We believe that EPA should withdraw the Draft TMDL and instead work with the states in the Chesapeake Bay watershed and the District of Columbia (Chesapeake Bay jurisdictions) to develop TMDLs in 2011 for tidal waters in the Chesapeake Bay watershed impaired by nutrients and sediments. This delay will allow EPA to update the Chesapeake Bay Watershed model to correct known deficiencies with respect to nutrient management effectiveness and suburban land characteristics. See letter dated June 11, 2010, from Shawn Garvin, Regional Administrator, EPA Region III, to the Principal's Staff Committee (discussing plans to update the model to address these flaws).

Withdrawing the Draft TMDL will not only allow EPA to correct deficiencies in its modeling, it also will allow EPA to take action on changes to water quality standards proposed by the State of Maryland and the Commonwealth of Virginia. In the Draft TMDL, EPA is presenting two sets



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of allocations, one based on current water quality standards and another based on anticipated changes to Maryland and Virginia standards. In addition, in 2011 EPA anticipates that it will have sufficient data to evaluate whether the dissolved oxygen criteria it is using are protective. See Draft TMDL, App. D, at 1.

If EPA refuses to withdraw the Draft TMDL, at a minimum EPA must make available for public review the scenario data and scenario results that are the inputs and outputs of the “Scenario Builder” model that provides inputs to the Chesapeake Bay Watershed model. EPA is relying on these inputs to determine the assumptions under which the model predicts that water quality standards will be met. EPA then incorporated those assumptions into the Draft TMDL. See Draft TMDL, section 8 and Appendix H.

Scenarios representing different nutrient and sediment loading conditions were run using the Chesapeake Bay Phase 5.3 Watershed Model and the resultant model scenario output was fed as input into the Chesapeake Bay Water Quality Model to evaluate the response of critical water quality parameters, specifically dissolved oxygen, water clarity, underwater bay grasses and chlorophyll *a*.

Draft TMDL, Appendix H, at 1. Despite their significance, these scenario inputs and outputs are not available. See <http://ches.communitymodeling.org/models/CBPhase5/index.php> (accessed October 10, 2010). This information must be made available for public review, as the calculations used to establish TMDLs are required to be subject to public review.

EPA acknowledges that the “Chesapeake Bay TMDL is the largest, most complex TMDL in the country, covering a 64,000-square-mile area in seven jurisdictions.” Draft TMDL, at 2-7. As noted above, EPA is proposing two separate sets of load allocations and waste load allocations for three pollutants in 92 water body segments (one set to meet current water quality standards and one set to meet proposed water quality standards that may or may not be approved by the time the TMDL is issued). Thus, the Draft TMDL consists of 552 separate TMDLs.

These TMDLs include allocations for 1006 individual residences, by individually naming the homeowners in Appendix Q. The Draft TMDL also threatens to impose allocations on small entities that raise one or more animals, but are not large enough to require a permit under the Clean Water Act. According to the U.S. Department of Agriculture, in 2002 there were a total of 111,692 livestock operations of all sizes in Virginia, West Virginia, Maryland, Delaware, Pennsylvania, and New York. In 2001, EPA estimated the total number of animal feeding operations with 300 animal units or more in these states to be 4,360. While these are statewide numbers, and the number of operations in the Chesapeake Bay watershed will be smaller, these numbers indicate that a very large number of small livestock operations could be affected by the



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Draft TMDL. At this point, the potentially affected small farms are not individually listed in the Draft TMDL, but the intent to regulate them is there.

Further, the Draft TMDL that EPA made available for review on September 24, 2010, consists not only of these wasteload and load allocations, but also consists of detailed implementation instructions directed at the watershed jurisdictions. Thus, the Draft TMDL consists not only of the 370 pages of the Draft TMDL document, but also the 1672 pages of the 22 appendices, as well as the technical analysis and modeling information that is referenced throughout the draft TMDL. We have not attempted to quantify the volume of that supporting information.

Despite its acknowledgement that the Draft TMDL is the most complex ever attempted, EPA is allowing only 45 days for public comment. We believe that 45 days is insufficient under the Administrative Procedure Act to provide for meaningful public comment on the Draft TMDL by any entity, and particularly by the homeowners and small animal feeding operations who may be completely unaware of this effort to regulate them. Accordingly, we request a 120 day comment period beginning on the date that EPA makes available for public review the inputs to and outputs from the Scenario Builder model.

We are aware that EPA signed a settlement agreement with the Chesapeake Bay Foundation (CBF) agreeing to finalize a TMDL for nutrients and sediment for the Chesapeake Bay watershed by December 31, 2010. Further, this date is embodied in a settlement agreement, not a judicial consent decree, so EPA need only seek an extension from CBF. Even if the CBF is unwilling to agree to a modification of the settlement agreement, the only remedy CBF has under that agreement is to reinstate its lawsuit against EPA, which we believe is without merit. Further, if EPA makes the information relating to Scenario Builder available to the public quickly, the Agency will still be able to issue the 23 TMDLs in Virginia and the 2 TMDLs in the District of Columbia by May 2011, avoiding the need to amend the consent decrees requiring issuance of those TMDLs by May 1, 2011 and May 31, 2011, respectively.

Thank you, in advance, for your consideration in this request.

Sincerely,

Stephen Haterius
Executive Director

cc: Peter Silva, EPA